ORIGINAL

No. 89-5691

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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SUPREME COURT, U.S.

FRASIEL L. HUGHEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly ordered petitioner, who pleaded guilty to one count of fraudulent use of a credit card, to make restitution to the issuer of the credit card for its losses caused by petitioner's overall course of conduct involving the issuer's credit cards.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 877 F.2d 1256.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1989, and the petition for a writ of certiorari was filed on September 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of fraudulent use of a credit card, in violation of 18 U.S.C. 1029(a)(2). He was sentenced to eight years' imprisonment. He also was ordered to pay $90,431 in restitution under the Victim and Witness Protection Act, 18 U.S.C. 3579(a), to the bank that issued the credit card. Petitioner filed a motion under Fed. R. Crim. P. 35 to correct his sentence to limit restitution to the amount of the losses caused by the acts underlying the single count to which he pleaded guilty. The district court denied that motion, and the court of appeals affirmed. Pet. App. 1-12.

1. The facts are summarized in the opinion of the court of appeals. During 1985 and 1986, while petitioner was a postal

employee in San Antonio, Texas, he stole and used a number of credit cards issued by MBank USA after those cards had been returned to the Post Office as undelivered mail. At least 21 credit cards were involved, with total losses to MBank of more than $90,000. In a second superseding indictment, petitioner was charged with three counts of mail theft (18 U.S.C. 1709) and three counts of fraudulent use of a credit card (18 U.S.C. 1029(a)(2)). The crimes charged in the indictment involved five of the stolen credit cards. Pet. App. 2-3.

Petitioner pleaded guilty to one count of fraudulent use of a credit card issued to Hershey Godfrey. The losses to MBank from that one card totaled $10,412. As part of the plea agreement, the government dismissed the remaining counts and agreed not to prosecute petitioner "for any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment." Pet. App. 3.

At petitioner's sentencing, the government sought an order of restitution under the Victim and Witness Protection Act (VWPA), 18 U.S.C. 3579(a). See note 2, infra. In support of its motion, the government offered a stipulation of testimony showing that petitioner was responsible for $90,431 in losses to MBank resulting from unauthorized charges on 21 credit cards that petitioner had stolen from the Post Office. See Pet. App. 3 n.1. Petitioner made no objection, although he noted that the stipulation was only to expected testimony, not fact. The district court ordered restitution under the VWPA for the full amount supported by the stipulation of testimony, $90,431. Pet. App. 3.

2. Petitioner then filed a motion under Fed. R. Crim. P. 35 to correct his sentence, arguing that the district court exceeded its authority under the VWPA by ordering restitution in an amount greater than the loss caused by petitioner's unauthorized charges on the Godfrey credit card alone. That motion was denied by order dated October 7, 1987. Pet. App. 4.

3. The court of appeals affirmed the district court's denial

of relief under Rule 35. Pet. App. 1-12. The court interpreted the VWPA to permit restitution for losses caused by petitioner's entire course of credit-card fraud involving MBank, not merely the specific violation to which he pleaded guilty. Pet. App. 4-6. The court found support for this holding in the text, legislative history, and purposes of the restitution provisions of the VWPA, id. at 4-6, and the decisions of other courts of appeals. Id. at 6-9. The court relied in particular on United States v. Duncan, 870 F.2d 1532 (10th Cir.), cert. denied, 110 S. Ct. 264 (1989), in holding that the VWPA "permits a court to require restitution beyond that amount involved in the offense of conviction when there is a significant connection between the crime of conviction and similar acts justifying restitution." Pet. App. 9. The court found that the appellate decisions cited by petitioner in support of a restrictive reading of the VWPA either were consistent with a broader reading of the statute or involved issues distinct from the scope of the district court's restitution authority. Id. at 8-9.

ARGUMENT

Petitioner contends (Pet. 6-12) that the district court improperly awarded restitution for losses to MBank that resulted not only from the criminal violation to which he pleaded guilty, but also from other similar acts that were part of the same scheme of wrongdoing involving credit cards issued by that bank. The court below correctly rejected that claim. This Court recently denied review in another case raising the same issue, Duncan v. United States, No. 88-7294 (Oct. 10, 1989), and there is no reason for a different disposition here. 1/

1.a. Under the VWPA, the sentencing court is authorized to order "that the defendant make restitution to any victim of the offense." 18 U.S.C. 3579(a) (1982). 2/ The purpose of the VWPA

1/ We have furnished counsel for petitioner with a copy of our brief in opposition in Duncan.

2/ The restitution provisions of the VWPA were originally codified at 18 U.S.C. 3579 and 3580, but they were redesignated as 18 U.S.C. 3663 and 3664 (Supp. V 1987) by the Sentencing

(continued...)

is to redress injuries to a victim that are caused by the defendant's criminal conduct. As the Senate Report explained, the VWPA is designed to require defendants "to the degree possible to restore the victim to his or her prior state of well-being." S. Rep. No. 532, 97th Cong., 2d Sess. 30 (1982). "The premise of * * * [this] section is that the court in devising just sanctions for adjudicated offenders, should insure that the wrongdoer makes good[], to the degree possible, the harm he has caused the victim." Ibid. This legislative history is consistent with the statutory purpose set forth in the VWPA itself: "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." VWPA, Pub. L. No. 97-291, § 2(b)(2), 96 Stat. 1248, 18 U.S.C. 1512 note. 3/

In light of the broad remedial purposes of the VWPA, the court of appeals properly construed Section 3579(a) to authorize restitution for injuries sustained as a result of criminal acts that have a "significant connection" to the acts underlying the particular count on which the defendant was convicted. Pet. App. 9. Accord United States v. Duncan, 870 F.2d at 1536; see also United States v. Pomazi, 851 F.2d 244, 249 (9th Cir. 1988), quoting United States v. Davies, 683 U.S. F.2d 1052, 1055 (7th Cir. 1982)("in cases which involve a continuing scheme to defraud, 'it is within the power of the court to require

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2/ (...continued)
Reform Act of 1984, Pub. L. No. 98-473, Title II, §§ 212(a)(1) and (2), 98 Stat. 1987. The repeal and redesignation apply only to offenses committed after November 1, 1987. Id. § 235(a)(1), 98 Stat. 2031, as amended by Pub. L. No. 99-217, §§ 2, 4, 99 Stat. 3599, and Pub. L. No. 100182, § 2, 101 Stat. 1266. Petitioner's offenses occurred during 1985 and 1986, and his sentencing therefore was governed by the VWPA as formerly codified at 18 U.S.C. 3579 and 3580. For this reason, we will cite to those sections, as did the court of appeals.

3/ Petitioner does not contend that the restitution order violated his constitutional rights. Petitioner does assert (Pet. 4, 11) that he was not adequately warned prior to pleading guilty about the potential scope of the restitution order. However, petitioner does not argue that there was a violation of Fed. R. Crim. P. 11, which governs such matters. See also note 5, infra.

restitution of any amount up to the entire illicit gain from such a scheme, even if only some specific incidents are the basis of the guilty plea'"). By contrast, to limit restitution to losses caused by the specific criminal acts to which the defendant pleaded guilty would be incompatible with Congress's intent, discussed above, to provide victims of crime with adequate compensation.

The text of the VWPA imposes no such limitation. Section 3579(a), as applicable here, provides that "[t]he court, when sentencing a defendant convicted of an offense, may order * * * that the defendant make restitution to any victim of the offense." This language limits restitution to a "victim" of the offense, but it does not prescribe the permissible scope of restitution to a person who is properly found to be a victim. In particular, it does not limit restitution to those injuries that the victim sustained as a result of the criminal acts for which the defendant was convicted, and thereby require the court to ignore (and leave uncompensated) similar acts affecting the same victim that are part of the same overall course of conduct -- i.e., acts that have a "significant connection" to those underlying the count to which the defendant pleaded guilty. This conclusion is reinforced by the fact that the restitution provision of the predecessor Federal Probation Act authorized a court to order the defendant to make restitution for "loss caused by the offense for which conviction was had." 18 U.S.C. 3651 (repealed effective Nov. 1, 1987). As the court below observed (Pet. App. 5), this limiting language was omitted from the VWPA, an omission that manifests a congressional intent not to circumscribe restitution in the manner petitioner urges. See United States v. Berrios, 869 F.2d 25, 29 (2d Cir. 1989); United States v. Hill, 798 F.2d 402, 405 (10th Cir. 1986); cf. United States v. Barany, 884 F.2d 1255, 1257-1258 (9th Cir. 1989). 4/

4/ The conclusion that restitution is not limited to the amount caused by the offense for which conviction was had is also supported by 18 U.S.C. 3580(a), which provides that the court shall consider not only "the amount of the loss sustained (continued...)

b. The restitution order in this case was proper under the standards just discussed. There is no dispute that MBank, which issued the Godfrey credit card, was a "victim" to which the court was authorized to order restitution. It also is clear that the order limited restitution to losses sustained as a result of acts that had a "significant connection" to the criminal violation involving the Godfrey credit card: as the court of appeals explained, petitioner "was charged with multiple offenses, and the various counts are similar to each other," and "each of the offenses which were not charged in the indictment but form the basis for the restitutive amount involved the same defendant, the same victim, and the same type of crime." Pet. App. 6. In short, petitioner's actions pertaining to the Godfrey credit card were part of a single course of conduct involving the theft and fraudulent use of MBank-issued credit cards.

2. Contrary to petitioner's contention (Pet. 7-10), the decision below does not give rise to a circuit conflict warranting reviewing by this Court.

a. As petitioner concedes (Pet. 9-10), the Second and Tenth Circuits have reached the same result as the court below, in essentially identical circumstances. Those courts have held that restitution may be awarded for losses sustained as a result of criminal violations that have a "significant connection" to the particular violations of which the defendant was convicted. United States v. Berrios, supra; United States v. Spambanato, 876 F.2d 5 (2d Cir. 1989); United States v. Duncan, supra; United States v. Hill, supra. As petitioner further concedes (Pet. 8-9), the Seventh and Ninth Circuits have reached a similar result where the conduct for which restitution was ordered was part of the same fraudulent scheme. United States v. Davies, supra; United States v. Paul, 783 F.2d 84, 88 (7th Cir. 1986); United

4/ (...continued)
by any victim as a result of the offense," but also "such other factors as the court deems appropriate." See Pet. App. 5; United States v. Berrios, 869 F.2d at 28-29.

States v. Peredo, 884 F.2d 1029, 1031 (7th Cir. 1989); 5/ United States v. Pomazi, 851 F.2d at 248-249; United States v. Barany, 884 F.2d at 1260. It does not matter that the indictment in this case did not actually charge a scheme to defraud, because it was understood that petitioner's conduct in fact amounted to such a scheme. This understanding is reflected in the plea bargain, in which the government agreed not to prosecute petitioner "for any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment." Pet. App. 3 (emphasis added). The district court expressed the same view in its order denying petitioner's Rule 35 motion. 6/ In any event, the relevant factor for purposes of the scope of a court's restitutionary authority is that the other incidents of unlawful use of a credit card on which the order at issue here was based were "significantly connected" to petitioner's use of the Godfrey

5/ Petitioner relies (Pet. 9, 11) on the statement in Paul, reiterated in Peredo, that the amount of restitution must be established at the time of the plea agreement. However, in the court below, petitioner relied on a similar statement in other Seventh Circuit decisions only for the proposition that sentencing must be based on reliable information, not in support of a jurisdictional-type limitation on the trial court's authority. See C.A. Br. 10-11. Here, the amount of restitution was reliably established by the government's proffered stipulation. See page 2, supra. Moreover, petitioner concedes (Pet. 11) that the district court informed him at the time it accepted his guilty plea that restitution might be imposed. Petitioner's emphasis (Pet. 4-5, 11) on his refusal to admit to the facts in the stipulation of testimony has no bearing on the outcome of this case. Petitioner had the opportunity at the sentencing hearing to present evidence rebutting the testimonial proffer by the government, but he failed to do so. As petitioner appears to concede (Pet. 5), the stipulation of testimony was plainly sufficient to satisfy the preponderance-of-the-evidence standard in 18 U.S.C. 3580(d) for determining the amount of restitution.

6/ The district court stated (10/7/87 Order, at 3-4 (Gov't C.A. Br. Addendum A)):

> Even if the existence of a scheme is a prerequisite to restitution beyond the counts of conviction, the Court finds that this requirement has been satisfied in this case. As a postal employee, [petitioner] Hughey developed a scheme by which he stole credit cards which had been returned to the post office undelivered. He stole at least 21 credit cards and either used them himself or caused them to be used to the detriment of the issuing banks. Even the plea agreement signed by [petitioner's] counsel refers to the "scheme alleged in the indictment."

card, in the sense that all such incidents were part of the same overall course of conduct.

b. Petitioner bases his claim of a circuit conflict (Pet. 8) principally on two Sixth Circuit cases, United States v. Durham, 755 F.2d 511 (1985), and United States v. Mounts, 793 F.2d 125, cert. denied, 479 U.S. 1019 (1986). Those cases, however, did not involve the question presented here: whether a court may order restitution for losses sustained as a result of the defendant's overall fraudulent scheme encompassing the count to which the defendant pleaded guilty.

In Durham, the Sixth Circuit stated that a "natural construction" of the term "offense" would "require that the defendant make restitution only to victims of the offense of which he was convicted." 755 F.2d at 512. Proceeding on that premise, Durham construed the term "victim" to have sufficient breadth to cover restitution orders like the one at issue here, stating that "Congress intended 'victim' to be interpreted very broadly" to include "a person who suffered injury as a result of the defendant's actions that surrounded the commission of the offense, regardless of whether the actions are elements of the offense charged." Id. at 513. It therefore held that the trial court could order restitution for the loss of an automobile that was destroyed during the bank robbery to which the defendant pleaded guilty, even though he was not charged with destruction of the automobile and it was not an element of the offense of bank robbery.

In Mounts, the Sixth Circuit similarly held that the defendant, who pleaded guilty to the receipt of explosives transported in interstate commerce, could be required to make restitution to a company for losses sustained by the use of explosives on its premises, even though he was not convicted of the count charging destruction of those premises. The court also held that restitution could be ordered for damage to an automobile used to escape the scene. The court expressed the view that whether restitution was properly awarded for the latter

purpose "present[ed] a more difficult problem under the restrictive definition of 'offense' in Durham, yet it is easily disposed of under the expansive definition of 'victim,'" because Durham's broad definition of "victim" permits restitution for any harm arising out of "an uninterrupted series of events surrounding the criminal activity" of the defendant. 793 F.2d at 128.

For several reasons, Durham and Mounts do not present a circuit conflict with the decision below that warrants review by this Court. First, the Sixth Circuit's statement that a natural construction of the term "offense" would "require that the defendant make restitution only to victims of the offense of which he was convicted" does not appear to have been intended to limit the scope of a restitution award to a person who has properly been found to be a "victim." Rather, that statement was intended to guide a decision on the threshold question of whether the prospective beneficiary of a restitution order may be regarded as a "victim" in the first place: the court simply made it clear that, in order for a person to qualify as a victim, he must have been injured by the offense of which the defendant was convicted. MBank satisfies that threshold requirement here, because petitioner does not dispute that MBank was injured by his fraudulent use of the Godfrey card. The Sixth Circuit did not discuss the further question, presented here, of what limitations there may be on the amount of restitution that may be ordered to a person who satisfies that threshold and therefore is a "victim."

Second, even if we assume that the Sixth Circuit did intend to address the question as well in Durham and Mounts, it "effectively obliterated" the supposedly narrow definition of the term "offense" by applying a broad definition of "victim," since "the injury caused by 'acts surrounding the offense' clearly contemplates acts other than the elements of the crime for which the defendant was convicted." United States v. Duncan, 870 F.2d at 1537 n.2, quoted in Pet. App. 8-9.

Third, because the Sixth Circuit held that restitution could be ordered in the circumstances presented by Durham and Mounts on the basis of its broad interpretation of "victim," its brief discussion of "offense" was unnecessary to the decision. Neither case involved a scheme or interrelated course of conduct involving similar criminal acts affecting a particular victim -- although, significantly, in each case the Sixth Circuit held, like the court below, that the restitution order need not be limited to losses suffered by acts that constituted elements of the offense of which the defendant was convicted. 1/

1/ Another case cited by petitioner (Pet. 8), United States v. Barnette, 800 F.2d 1158 (11th Cir. 1986), cert. denied, 480 U.S. 935 (1987), arose under the Federal Probation Act (FPA) as well as the VWPA. The FPA expressly limited restitution to the "loss caused by the offense for which conviction was had." 18 U.S.C. 3651. As the court below recognized (Pet. App. 5-6), and as petitioner acknowledges (Pet. 6-7), Congress enacted the VWPA because of its dissatisfaction with the restrictive scope and application of the restitution remedy under the FPA.

The Eleventh Circuit stated in Barnette that the amount of restitution under the FPA or VWPA "may not exceed the actual losses flowing from the offense for which the defendant has been convicted." 800 F.2d at 1571. That statement was dictum, however, because Barnette did not involve a challenge to restitution based on conduct other than that underlying the count on which the defendant was convicted, and the restitution order was sustained on the ground that the record established such losses in the amount ordered by the trial court. Moreover, in support of the quoted passage, the court in Barnette cited a prior case arising solely under the FPA, which contained the limiting language quoted above. See United States v. Johnson, 700 F.2d 699, 701 (11th Cir. 1983). As the court below noted (Pet. App. 9), the Eleventh Circuit apparently overlooked the fact that Congress omitted that limiting language from the VWPA. In light of this oversight and the fact that the statement in Barnette on which petitioner relies was dictum, that passing statement does not give rise to a conflict with the decision below that would warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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